DEC 4 2000

(6)

Supreme Court, U.S.
FILED
DEC 4 - 2000
CLERK

No. 99-2035

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL, THE EMPLOYERS GROUP, AND THE BOEING COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a punitive damage award?

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INTEREST OF *AMICI CURIAE*

The California Employment Law Council ("CELC"), The Employers Group ("TEG"), and The Boeing Company ("Boeing") respectfully submit this brief *amici curiae* in support of petitioners to assist the Court in analyzing the important constitutional issues raised in this case.[1] The purpose of this brief is to demonstrate that in order to preserve and enforce the constitutional prohibition against excessive punitive damage awards, independent appellate review of punitive damages verdicts is constitutionally required.

CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development of reasonable, equitable and progressive rules of employment law. CELC's membership includes more than 60 private sector employers in the State of California, which collectively employ well in excess of a half-million Californians. This case is of great interest and importance to CELC's members. CELC is familiar with the questions involved in this case, and believes that the standard of review of constitutional challenges to punitive damages awards is an issue that significantly affects the rights of its members.

The Employers Group is one of the nation's oldest and largest human resources management associations, representing nearly 5,000 companies of all sizes and every industry, which employ approximately 2.5 million

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for both petitioners and respondents have consented to the filing of this *amici* brief in letters that have been lodged with the clerk.

employees. The Employers Group's extensive experience with the legal issues faced by business enterprises of all shapes and sizes provides it with a unique perspective that will hopefully assist the Court in considering the important issues presented in this case.

Boeing is frequently sued in federal and state courts by plaintiffs seeking punitive damages. The randomness of the jury system sometimes results in the return of a verdict awarding punitive damages. Accordingly, Boeing has an interest in the proper resolution of the question presented in this case. For example, Boeing intends to file a petition for a writ of certiorari with this Court seeking review of the decision of the California Court of Appeal in *Verdine v. McDonnell Douglas*, No. B126205, slip op. (Cal. Ct. App. July 26, 2000). In that case, the court of appeal refused to conduct an independent review of the constitutional validity of a $9 million punitive damage award in a single-plaintiff employment case, and instead sustained the award under a deferential standard of review.

Meaningful appellate review is a cornerstone of this Court's jurisprudence and provides an essential protection against unreasonable jury awards. *Amici* are concerned that any standard less rigorous than independent review would denigrate the important concerns identified by this Court in *BMW of North America v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), and provide inadequate protection for defendants subjected to unconstitutionally excessive punitive damages awards. Accordingly, *amici* are well situated to assist the Court in resolving the important issues presented in this case.

STATEMENT

Respondent Leatherman Tool Group, Inc., brought this action against petitioner Cooper Industries, Inc., in the United States District Court for the District of

Oregon, asserting claims for violation of the Lanham Act and common law claims for unfair competition, false advertising, and "passing off." Pet. App. 32a. Respondent alleged that petitioner had improperly used respondent's tool in some promotional materials purporting to feature petitioner's product. The case proceeded to a jury trial and the jury awarded respondent $50,000 in compensatory damages and $4.5 million in punitive damages, solely with respect to the common law claims. Petitioner filed a post-trial motion in the district court arguing that the punitive damage award, amounting to ninety times the compensatory damage award, was unconstitutionally excessive under the Due Process Clause. Pet. App. 24a. After the district court refused to reduce this verdict, the Ninth Circuit engaged in a deferential review for abuse of discretion and found that, in light of the evidence at trial, the district court did not abuse its discretion in finding the award permissible. Pet. App. 3a-4a. This Court then granted certiorari to decide whether appellate courts are required to independently review alleged constitutional violations of due process stemming from the assessment of punitive damages.

SUMMARY OF ARGUMENT

In numerous contexts, this Court has repeatedly ensured that constitutional protections are fully observed by requiring appellate courts to rely on their own independent review of constitutional matters of law. This Court has also extended independent review to certain "constitutional facts" in an effort to guarantee that important constitutional protections are not undermined by inadequate provisions for searching judicial review. The same principles require application of independent appellate review in the area of excessive punitive damage awards.

Punitive damages may properly be imposed by States and the federal government to further governmental

interests in punishing unlawful conduct and deterring its repetition. This Court has made clear, however, that this power is limited, because if punitive awards are "grossly excessive," they enter a "zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996). Despite this Court's announcement of the federal constitutional limits on punitive damage awards, the incidence of constitutionally unreasonable punitive damages is on the rise. Unless the Court ensures meaningful appellate review of jury awards, the constitutional protections recognized in *BMW* will be undermined. Meaningful review requires independent appellate review, regardless of whether the excessiveness inquiry is viewed as a question of law (as it should be), as a question of constitutional fact, or as a mixed question of law and fact. Independent appellate review would enhance, and is fully consistent with, the analysis laid out by this Court in prior cases.

ARGUMENT

I. The Protection Against Excessive Punitive Damages Is Firmly Rooted In The Constitution

This Court has repeatedly held "that the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion) (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)); *see Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994) ("the Constitution imposes a substantive limit on the size of punitive damage awards"). The constitutional prohibition against excessive punitive awards and sanctions has long been recognized in this Court's Due Process Clause jurisprudence. *See Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) (setting aside a penalty imposed on a telephone company because it was so "plainly arbitrary and oppressive" as to violate

the Due Process Clause). Justice Kennedy's concurrence in *TXO* aptly describes the important and weighty interests involved in the imposition and review of punitive damage awards:

> [The Constitution's] fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award.

509 U.S. at 467.

Accordingly, the Court's jurisprudence in this area has recognized that the Constitution provides an upper limit on punitive damages so a defendant has "fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996); *see Honda Motor Co.*, 512 U.S. at 420. This protection against excessive punitive awards is a fundamental and important part of our constitutional panoply of rights.

II. Independent Appellate Review Of Excessive Punitive Damages Is Necessary To Protect The Rights Guaranteed Under The Due Process Clause

In order to preserve the constitutional protections underlying this Court's due process jurisprudence in the area of punitive damage awards, meaningful judicial review of punitive damage awards is required at both the trial and appellate level. Meaningful appellate review aids the development of the law, but more fundamentally it acts as an essential layer of support for those values we hold dear. Because constitutional rights are our

most cherished rights, courts have always had an unflagging obligation to make certain they are not infringed upon. The importance of rigorous appellate review in the constitutional context is illustrated by this Court's discussion in *Bose Corp v. Consumer Union*, 466 U.S. 485 (1984):

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan*, [376 U.S. 254 (1984)] is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution .... Judges as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold ....

Id. at 510-511.

While *Bose* arose in the First Amendment context, the *Bose* Court's analysis applies with equal force in cases involving enforcement of the Due Process Clause's prohibition against grossly unreasonable punitive damage awards. The need for searching review is most acute when constitutional interests are at stake.

A. The Danger Of Excessive Awards Is Significant

Many members of the Court have expressed concern about the due process implications of runaway jury verdicts, especially the potential that juries will be left with no meaningful standards to constrain excessive punitive damage awards. In *Pacific Mutual Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991), for example, the Court stated that it and many "individual Justices thereof on a number of occasions in recent years ha[d] expressed doubts about

the constitutionality of certain punitive damages awards." In the earlier case of *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), Justice Brennan remarked that "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating decision." *Id.* at 281 (Brennan, J., concurring). Also in *Browning-Ferris*, Justice O'Connor cogently observed that "[a]wards of punitive damages are skyrocketing .... I adhere to my comments ... regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Id.* at 282-83 (O'Connor, J., concurring in part and dissenting in part).

The Court is not alone in its recognition of the increasing frequency of punitive damage awards. Numerous commentators have also addressed this issue. *See, e.g.*, Russel Myles & Kelly Reese, *Arbitration: Avoiding The Runaway Jury*, 23 AM. J. TRIAL ADVOC. 129 (Summer 1999); Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals For Reform By Courts And Legislatures*, 65 BROOK. L. REV. 1003 (1999); John Calvin Jeffries, Jr., *A Comment On The Constitutionality Of Punitive Damages*, 72 VA L. REV. 139 (1986) ("As everyone who reads the newspapers must know, the American civil liability system is approaching a crisis. One prominent aspect of this crisis is the problem of punitive damages. In my view, punitive damages are out of control."); James C. Goodale, *Why Did the Enquirer Pay $ 10 Million?*, N.Y. L.J., Aug. 7, 1998, at 3 (discussing how fear of an outrageous verdict may have caused huge settlement). These realities only enhance the need to provide adequate procedural protections to prevent encroachment on the fundamental liberties guaranteed under the Due Process Clause.

B. The Absence Of Effective Appellate Review Endangers Due Process

The decisions of this Court indicate that the absence of effective judicial review of punitive damage awards can threaten the integrity of a jury award so fundamentally as to amount to a violation of due process. In *Honda Motor Co.*, the Court considered the constitutional validity under the Fourteenth Amendment of a state constitutional provision that barred judicial review of the amount of punitive damages awarded by a jury unless there was "'no evidence to support the verdict.'" 512 U.S. at 418 (citation omitted). The jury in that case had awarded $5 million in punitive damages, and the lower state courts refused to reduce the award despite Honda's argument that it violated the Due Process Clause. *See id.* The Oregon Supreme Court affirmed, holding that there was no constitutional requirement that state courts always review punitive damage awards for excessiveness. *See id.* at 419.

On review, this Court began by recognizing the federal constitutional right to be free from excessive punitive damages, and then turned to the question whether judicial review is required as a matter of due process. The Court found that "[j]udicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded," *id.* at 421, and that the need for such review had only increased as "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." *Id.* at 431. The Court then concluded that the Oregon procedure could not pass constitutional muster. *See id.* at 430-32. The Court explained that judicial review of punitive damages was "one of the few procedural safeguards which the common law provided against" the "acute danger of arbitrary deprivation of property." *Id.* at 432. Accordingly, the "denial of judicial review of the size of punitive damage awards violates the Due Process Clause." *Id.*

The *Honda* decision built on the Court's earlier recognition in *Haslip* that a post-verdict judicial review of punitive damage awards is a crucial component of a permissible scheme for the imposition of punitive damages. In *Haslip*, the Court recognized "that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 499 U.S. at 18. The Court permitted the award to stand in *Haslip* only because it found that "[t]he Alabama Supreme Court's postverdict review ensure[d] that punitive damages awards [we]re not grossly out of proportion to the severity of the offense and ha[d] some understandable relationship to compensatory damages." *Id.* at 22.

Accordingly, meaningful appellate review is not only advisable, but constitutionally necessary to ensure due process. It is only with judicial review that the rights enshrined in the Constitution can be effectively preserved.

C. The Assessment Of Excessive Punitive Damage Awards Is A Question Of Law That Should Be Subject To Independent Review

To obtain this meaningful review with regard to punitive damage awards, independent judicial consideration of their amount and validity should be required. The resolution of punitive award cases turns on questions of law that traditionally have been subject to independent review.

"[T]he Court has yet to arrive at 'a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.'" *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982)). "Perhaps much of the difficulty in

this area stems from the truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact' is sometimes as much a matter of allocation as it is of analysis." *Miller v. Fenton*, 474 U.S. at 113-14 (citation omitted). The Court has frequently made the classification based on its assessment of whether one judicial actor is better suited to the task than another. *See id.* at 114. For example, the Court has sometimes treated questions as presenting issues of fact when witness credibility is important, or has classified questions as issues of law when the role of a federal appellate court as the expositor of law was threatened, as with the issue of "actual malice" in the First Amendment context. *See id.*

Other questions may lack a specific classification, but the Court's approach indicates the nature of the inquiry. In *BMW*, for example, although the Court never stated whether it considered the excessiveness issue to present an issue of law or fact, the circumstances make clear that the Court was treating the case as presenting a question of law. *BMW* arose out of the review of an Alabama state court proceeding. *See* 517 U.S. at 563. This Court has repeatedly reaffirmed its unwillingness to review fact finding by state courts. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111-12 (1980) ("we customarily accept the factual findings of state courts in the absence of 'exceptional circumstances'") (citing *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952)); *see also Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996) ("'A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact . . . in the absence of a very obvious and exceptional showing of error.'") (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949)). Consequently, the *BMW* Court must have been engaging in review as a matter of law.

Similarly, in *TXO*, the Court's extensive discussion about the parties' interest in differing bright-line tests for excessiveness reveals that the Court considered the excessiveness question as a matter of law. *See* 509 U.S. at 453-62. Thus, the Court's jurisprudence demonstrates that the constitutional excessiveness inquiry is a question of law that should be subjected to independent judicial review.

The Court's discussion in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), is particularly instructive regarding the need for independent judicial review of these sorts of questions of law. In *Salve Regina*, the Court addressed the question whether the courts of appeals were required to independently review district courts' determinations of state law. *See id.* at 227. Finding a split among the circuits regarding the appropriate deference owed to a district court's interpretation of state law, the Court decided that independent de novo review was appropriate. *See id.* at 231.

The Court began by noting the following general principle: "*The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.*" *Id.* (emphasis added). The Court then catalogued some of the difficulties caused by affording trial courts more deference than is appropriate. The Court noted that trial judges often preside over fast-paced trials and out of necessity devote much of their time to reviewing evidence and hearing witnesses. *See id.* at 231. As the Court explained, "trial judges often must resolve complicated legal questions without benefit of extended reflection [or] extensive information." *Id.* at 232 (internal quotation omitted; alteration in original). By contrast, courts of appeals are "structurally suited to the collaborative juridical process that promotes decisional accuracy." *Id.*

The *Salve Regina* Court also described the benefits of independent appellate review, many of which apply with

equal force to the question of constitutionally excessive punitive damage awards:

> Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review . . . . Any expertise possessed by the district court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing court . . . . [A]n appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions.

Id. at 232-33. Lastly, the court rejected the notion that deference was owed to the trial court because it might be more familiar with state law. *See id.* at 238-39.

This case reveals two fundamental principles essential to the Court's resolution of the standard of review in punitive damage cases: (1) independent appellate review contributes significantly to meaningful review, and (2) independent appellate review is warranted when the issue before the court requires reflective, analytical, and objective analysis more properly suited to the skills and functional duties of appellate courts.

This Court has long applied independent appellate review of analogous constitutional questions that, like judicial review of excessive punitive awards, involve application of a legal standard to the totality of the circumstances presented. For example, the Court has held that independent appellate review is required with respect to determinations of probable cause and reasonable suspicion under the Fourth Amendment. Like the assessment of constitutional reasonableness for punitive awards, this area of the law is not easily subject to bright-line rules because it "is not possible" to "[a]rticulat[e] precisely" what these standards mean. *Ornelas v. United States*,

517 U.S. 690, 695 (1996). Instead, the decisionmaking process involves application of "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed." *Id.* at 696.

Given these aspects of the legal standards, the *Ornelas* Court concluded that independent appellate review of probable cause and reasonable suspicion was necessary. *Id.* at 697 ("We think independent appellate review of these ultimate determinations of reasonable suspicion and probable cause is consistent with the position we have taken in past cases. We have never, when reviewing a probable-cause or reasonable-suspicion determination ourselves, expressly deferred to the trial court's determination."). The Court explained that the relevant legal rules for probable cause and reasonable suspicion "acquire content only through application." *Id.* Crucial to the development of such rules was independent appellate review: "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles." *Id.*

Similarly, in *Thompson v. Keohane*, 516 U.S. 99 (1995), the Court considered the question whether "in custody" determinations in the habeas corpus context were questions of law subject to de novo review or questions of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *See id.* at 106-07. The Court ultimately concluded that the "in custody" determination should be reviewed de novo as a question of law. *See id.* at 112. The Court reasoned that two discrete inquiries were essential to the "in custody" decision: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* The court concluded that "[o]nce the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry." *Id.* (in-

ternal quotation omitted). Accordingly, the Court held that independent appellate review was required. *See id.*

Essentially the same considerations compel the conclusion that independent appellate review is required in the punitive damages context. As is true of the "in custody" or "voluntariness" inquiry, an appellate court reviewing an excessiveness claim in a punitive damages case is presented with a trial court record that sets the scene and reconstructs "the players' lines and actions," and the only role of the appellate court is to consider and apply the legal factors identified by the Court in *BMW*, *Honda Motor Co.*, *TXO*, and *Haslip*, to decide whether the award is constitutionally excessive. Thus, the appellate court "must apply an objective test to resolve the ultimate inquiry," *Thompson v. Keohane*, 516 U.S. at 112, and de novo review is therefore appropriate.

The Eleventh Circuit in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), offered a congent and persuasive analysis of this issue in the punitive damages context. The question presented in that case was whether a judicial reduction of a punitive damages award as excessive constituted a violation of the Seventh Amendment. In resolving that question, the court examined the role of a court in reviewing the amount of a punitive damage award and concluded that this role entailed the resolution of a question of law, not one of fact.[2] *See id.* at 1330-31. The court explained: "No one would dispute that the court, not the jury, has the responsibility for determining the constitutional limit. Courts decide questions of law, not juries." *Id.* at 1331. Having determined that the excessiveness inquiry presented a legal question, the Eleventh

[2] The court of appeals did review certain underlying facts involved in the *BMW* analysis for clear error. *See Johansen*, 170 F.3d at 1334.

Circuit then concluded that independent review was required:

> A constitutional reduction . . . is a determination that the law does not permit the award. Unlike a remittitur, which is discretionary with the court and which we review for an abuse of discretion . . . a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.

Id. (citing *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996); *BMW*, 517 U.S. at 585).

As noted in the petition, several other courts of appeals have reached the same conclusion. *See e.g.*, *Conner v. Schrader-Bridgeport International, Inc.*, 227 F.3d 179, 202 (4th Cir. 2000) ("Whether the jury's award was excessive is a question of law, which we review *de novo*."); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219 (10th Cir. 2000) (applying de novo standard of review for punitive damages assessed against company president) (citing *FDIC v. Hamilton*, 122 F.3d 854, 857 (10th Cir. 1997)); *United States v. Big D. Enters., Inc.*, 184 F.3d 924, 932-33 (8th Cir. 1999) ("Appellants characterize the award as 'grossly excessive' and claim that it violates their due process rights . . . . We review the district court's conclusions de novo.").[3]

[3] Other courts of appeals have reached the opposite conclusion. *See e.g.*, *Pavon v. Swift Transportation Co.*, 192 F.3d 902, 909 (9th Cir. 1999); *Morse v. Southern Union Co.*, 174 F.3d 917, 926 (8th Cir. 1999); *Lee v. Edwards*, 101 F.3d 805, 808-09 (2d Cir. 1996). State courts are similarly split. *Compare MacCrone v. Edwards Ctr., Inc.*, 980 P.2d 1156, 1165 (Or. Ct. App. 1999) (en banc) (construing *BMW* to require an independent appellate review); *Routh Wreckage Serv., Inc. v. Washington*, 980 S.W.2d 240, 244-45 (Ark. 1998) (applying de novo review) *with Condon Auto Sales & Serv. Inc. v. Crick*, 604 N.W.2d 587, 595 (Iowa

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Most of the lower court decisions reaching a contrary conclusion rely to some degree on *Browning-Ferris v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), or *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). *Browning-Ferris* does not compel this conclusion, however, because in that case the Court held that the due process challenge to the allegedly excessive punitive damage award was not properly before the Court. *See Browning-Ferris Indus.*, 492 U.S. at 277. In that case, the petitioner's central contention (which the Court rejected) was that the Eighth Amendment's Excessive Fines Clause applied to constrain awards of punitive damages in private civil suits. *See id.* at 275. The Court's discussion of a deferential standard of review was clearly addressed only to the defendant's motion for a new trial or remititur under FED. R. CIV. P. 59, not to a due process excessiveness challenge. *See id.* at 279. Accordingly, *Browning-Ferris* does not resolve the question of the appropriate standard of review for claims of unconstitutionally excessive punitive damages awards in violation of the Due Process Clause.

Gasperini is equally inapposite, because it addressed only compensatory damages and did not involve any *constitutional* challenge to the size of a damages award. *See Gasperini*, 518 U.S. 415 (assessing the validity of New York statute authorizing appellate review of compensatory damages that deviate materially from reasonable compensation and applying an abuse of discretion standard for use by federal appellate courts). Thus, the clear weight of the relevant caselaw supports the application of an independent review standard for these questions of law.

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1999) (using abuse of discretion standard); *Owens-Corning Fiberglass Corp. v. Golightly*, 976 S.W.2d 409, 413-15 (Ky. 1998) (clear error).

D. Even If The Excessivenss Inquiry Were Not A Question Of Law, Independent Review Would Still Be Required

Even if the Court were to conclude that the assessment of excessive awards is an essentially factual inquiry, independent judicial review would still be necessary as a prophylactic measure to guard against the danger of unconstitutional deprivations. *See Agosto v. INS*, 436 U.S. 748, 753 (1978) (de novo judicial determination required for claims of American citizenship in deportation proceedings); *Turner v. Arkansas*, 407 U.S. 366, 368 (1972) ("Collateral estoppel is part of the Fifth Amendment's double jeopardy guarantee, and it is a 'matter of constitutional fact (this Court) must decide through an examination of the entire record.'") (citation omitted); *United States v. John J. Felin & Co.*, 334 U.S. 624, 639-40 (1948) (plurality opinion) ("when this Court reviews State court judgments involving constitutional issues it 'must review independently both the legal issues and those factual matters with which they are commingled.'") (citation omitted); *High v. Rhay*, 519 F.2d 109, 114 (9th Cir. 1975) ("Constitutional facts must be reviewed de novo on appeal . . . ."). Adoption of de novo review in this area would be consistent with the approach long followed by this Court in the First Amendment context.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court adopted the "actual malice" standard for public-figure defamation cases, and made clear that independent appellate review of the record is required in defamation cases "to assure . . . [that] a forbidden intrusion on the field of free expression" has not occurred. *Id.* at 285. The Court's rationale for requiring independent appellate review in such cases was not limited to the issue of "actual malice" or the area of First Amendment law. Instead, the Court expressed a considerably broader rationale, describing the independent review requirement as one arising from the Court's duty "in

proper cases . . . to make certain that [constitutional] principles have been constitutionally applied." *Id.* The case before it was "such a case" in the Court's view, "since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'" *Id.* (citation omitted).

The Court recently reaffirmed the independent review requirement for constitutional facts in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984). The Court stated: "The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review." *Id.* at 508 n.27. The *Bose* Court characterized the independent review requirement as applying "in cases raising First Amendment issues," noting that in such cases the Court has "repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (citation omitted). The rationale for the independent review requirement rests upon the fundamental obligation of courts to guard zealously the boundary between constitutionally protected and unprotected speech. *See id.* at 505.

If the Court decides that the review of punitive damage awards essentially involves a factual determination, the Court should apply an independent review requirement, because, as in the First Amendment context, searching scrutiny by appellate courts is essential in order to draw the line between constitutional and unconstitutional action. The drawing of this line should be the product of independent appellate review, which creates precedent and uniformity, rather than the result of inevitably conflicting and inconsistent trial court determinations that lack precedential effect and are reviewed only under a deferential standard.

The use of independent appellate review would also be warranted if the Court found the excessiveness determination to involve a mixed question of law and fact. Mixed questions of law and fact exist in situations where the law is clear, the facts undisputed, and a court's task is to assess whether the facts satisfy the legal standard. *See Pullman-Standard*, 456 U.S. at 289 n.19. In general, this Court's precedents support the conclusion that mixed questions of law and fact are reviewed de novo. *See* MOORE'S FEDERAL PRACTICE § 206.04, (3d ed. 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)); *see also United States v. John J. Felin & Co.*, 334 U.S. at 639-40 (plurality opinion) ("Where the conclusion is a 'composite of fact and law,' this Court may certainly hold that as a matter of law the findings are erroneous.") (quoting *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 223 U.S. 655, 668 (1912)). Additionally, all of the concerns identified above as warranting independent review of constitutional facts would apply with even greater force to mixed questions of law and fact. Accordingly, this Court should require appellate courts to conduct an independent review regardless of whether the assessment of constitutionally excessive punitive damage awards is a question of law, a question of constitutional fact, or a mixed question of law and fact.

III. The Factors Considered By Courts In Evaluating Constitutionally Excessive Awards Confirm The Need For Independent Review

This Court's decisions regarding punitive damage awards have created a legal framework to be applied by courts in evaluating whether a punitive award is "grossly excessive." *BMW*, 517 U.S. at 568. The nature of this inquiry further militates in favor of independent review. Under *BMW*, courts must look to three "guideposts" in deciding whether a punitive damage award is unconstitutionally excessive. *Id.* at 574. These guideposts are: (1) the "degree of reprehensibility" of the wrongdoing;

(2) "the disparity between the harm or potential harm suffered" by the plaintiff and the award; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 575. Despite the presence of these guideposts, however, the Court has repeatedly resisted invitations to fashion bright line rules, preferring instead to focus on general "reasonableness" concerns when evaluating whether a certain award is "grossly excessive." *TXO*, 509 U.S. at 458. A review of these necessarily flexible factors leads to the inescapable conclusion that appellate courts are best suited to the task of independently evaluating them.

The most important of these guideposts is the first factor. *See BMW*, 517 U.S. at 575. "As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.'" *Id.* (quoting *Day v. Woodworth*, 13 How. 363, 371 (1852)). Several underlying concerns should be reviewed by a court: (1) whether the harm was primarily or entirely economic in nature; (2) whether the defendant's conduct displayed a recklessness or indifference to others' health and safety; and (3) whether an injury, if economic in nature, was the result of intentional acts of misconduct or acts targeted to financially vulnerable individuals. *See id.* at 575-76. These are not factors that are unique to the perspective of trial courts. Rather, appellate courts routinely assess, by comparison to other cases and fundamental tenets, the reprehensibility of defendants' conduct. In fact, this Court and other appellate courts around the country have engaged in this type of analysis with regard to punitive damages on numerous occasions without difficulty or objection. The Court has merely evaluated the factors and in the process demonstrated appellate courts' ability, and indeed superior ability, to conduct such analysis.

The nature of the second "guidepost"—the ratio of the harm suffered to the punitive damage award imposed—also supports independent appellate review.

This analysis is often conducted by comparing the compensatory damage award with the punitive damage award. *See id.* at 580-83. However, the test is not "a simple mathematical formula, even one that compares actual and potential damages to the punitive award," because "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Id.* at 582. Although this analysis depends on the factual circumstances of a defendant's misconduct, it also relies significantly on an objective analysis of general reasonableness. *See id.* at 583. This objective analysis is best suited to the capabilities of appellate courts, with their consideration of many varied factual situations and their ability to better promote uniformity and consistency through the development of binding precedent.

The third guidepost, comparison to legislative evaluations of the reprehensibility of the conduct, is also not uniquely within the ability of trial courts. The briefing, argument, and multiple judge format of appellate court decision making enhances the likelihood that an appellate court will correctly determine the amount and type of penalties imposed by legislatures for similar conduct.

Accordingly, the nature of the inquiry required to assess possible due process violations counsels in favor of independent review. Appellate courts are at least as able as trial courts to review these types of considerations, and with regard to some factors, appellate courts are likely to have a distinct advantage. Moreover, the use of independent appellate review would complement the case-by-case approach the Court has adopted in this area and further the objects of due process. The case-by-case analysis properly relies on the expertise of courts in evaluating awards. However, the expertise of courts will not be fully brought to bear on this problem unless appellate courts are required to make their own independent reviews of punitive awards. Allowing appellate

courts to defer to the varied predilections of trial judges across the country may be expedient, but it threatens the effectiveness and uniformity of the excessiveness standard adopted by this Court to implement the Due Process Clause.

IV. The Court's Due Process Jurisprudence Reveals No Special Deference To Trial Courts' Excessiveness Determinations

It is also noteworthy that the Court's decisions addressing punitive damage awards have not indicated in any way that appellate courts should accord trial courts deference in reviewing a punitive damage award. *See BMW*, 517 U.S. 559 (containing little or no discussion of the trial court's ruling on the due process issue and giving no deference to that decision); *TXO*, 509 U.S. 443 (showing no indication of special deference to the trial court's resolution of the due process issue).

In *TXO*, for example, this Court's review of a $10 million dollar punitive damages award upheld by the West Virginia state courts included scant discussion of the trial court's ruling.[4] Instead, this Court actively reviewed the trial record, the conduct of the defendant, and the applicable law. *See TXO*, 509 U.S. at 454-62. This approach parallels the independent-review standard advocated by petitioner in this case. In the penultimate portion of the opinion addressing the validity of the punitive award, the *TXO* Court made no reference to the trial court. Rather, the Court stated that "[o]n the record,

[4] The Court's only significant discussion of the trial court's review was in response to the petitioner's contention that the court had failed to properly articulate its reasons for denying the motion alleging a constitutional violation. Read in context, it is quite apparent that this discussion arose as a result of petitioner's argument and not any underlying deference on the part of the Court.

the jury may reasonably have determined that [petitioner] set out on a malicious and fraudulent course to win back, either in whole or in part, the lucrative stream of royalties that it had ceded to Alliance." *Id.* at 462. The Court then concluded that it was "not persuaded that the award was so 'grossly excessive' as be beyond the power of the State to allow." *Id.* This analysis strongly suggests that the Court was directly reviewing the jury's action, not assessing whether the trial court abused its discretion.

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the Court discussed the function of judicial review of punitive awards without making any distinction between trial and appellate judges, stating that after the verdict, "[t]he jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15-16. Moreover, the Court's discussion recognized the value of rigorous appellate review. *See id.* at 21 ("appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose"). Again, the Court's analysis eschewed any deference to the trial court's assessment. Instead, the Court's decision to uphold the award was due to its own thorough review as well as that of the Alabama Supreme Court and the trial court. *See id.* at 23-24. In short, this Court's precedents provide further support for the principle of independent appellate review in this context.

CONCLUSION

The Court should take this opportunity to make clear that nothing short of independent appellate review will sufficiently guarantee defendants' constitutional rights to be free of excessive awards of punitive damages. In order to ensure adequate protection for this important constitutional right, the Nation's appellate courts must scrutinize punitive damage awards with care to make sure they satisfy the requirements of due process. The

judgment of the court of appeals should therefore be vacated, and the case remanded for independent appellate review of the punitive damages award.

Respectfully submitted.

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December 4, 2000